3-20-2017

Cook v. State Respondent's Brief Dckt. 44229

IN THE SUPREME COURT OF THE STATE OF IDAHO

JEREMY J. COOK,	)	
	)	**No. 44229**
Petitioner-Appellant,	)	
	)	**Canyon County Case No.**
v.	)	**CV-2015-8455**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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STATEMENT OF THE CASE

Nature Of The Case

Jeremy J. Cook appeals from the district court's denial of his motion to reconsider the dismissal of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

Cook pleaded guilty to felony DUI. (R., pp. 85-86.) He directly appealed from his judgment of conviction, which was affirmed by the Court of Appeals in State v. Cook, Docket No. 43258, 2016 Unpublished Opinion No. 372 (Ct. App., February 3, 2016).

Cook filed a *pro se* petition for post-conviction relief. (R., pp. 5-15.) In it, he set forth multiple allegations against trial counsel, including that counsel "continuously lied to petitioner throughout this case," threatened Cook's family, and "tried to extort money" from Cook's family. (R., p. 7 (capitalization altered).) He also alleged that trial counsel was ineffective because, among other things, "there exists evidence of material facts not previously presented or heard that would require vacation of the conviction and sentence, and in the best interest of justice." (R., p. 6 (capitalization altered).) Cook supported his petition with his own affidavit. (R., pp. 12-15.) Cook also filed a motion for appointment of counsel, which was granted. (R., pp. 21-25, 89-90.)

The state filed an answer (R., pp. 36-39) and a motion for summary dismissal (R., pp. 101-09). The state alleged, among other things, that Cook failed to raise a genuine issue of material fact showing either deficient performance or prejudice, and that Cook had "not shown that there was

inadequate preparation, ignorance of the law, or other objectively discoverable failures of his attorney." (R., pp. 106-07.)

The district court issued a notice of intent to dismiss. (R., pp. 118-26.) With respect to the claims that trial counsel extorted and lied to Cook and his family, the court concluded that these accusations were either unsupported, belied by the information in the record, or not viable claims for relief. (See R., pp. 121-24.) As to Cook's claims that trial counsel "was ineffective for refusing to examine evidence, refusing to speak to or listen to Petitioner's witnesses, and failing to present a defense," the court concluded those claims were not supported by admissible evidence. (R., p. 123.) The district court found that Cook didn't state what the evidence was, what it could have shown, who the putatively favorable witnesses were, what they could have said, or what defenses trial counsel "should have put forth, but did not." (R., p. 123.) Additionally, the court found that these claims were belied by the record, and to the extent they could have constituted non-jurisdictional defenses, Cook waived "any such defense" when he pleaded guilty. (R., pp. 123-24 (citing Heartfelt v. State, 125 Idaho 424, 426, 871 P.2d 841, 843 (Ct. App. 1994).) Lastly, regarding alleged "evidence of material fact not previously presented" requiring a vacation of the conviction and sentence, the court found that Cook "fails to set forth what that evidence is." (R., pp. 124-25.)

Cook's initial post-conviction counsel moved to withdraw (R., pp. 127-28), and Cook filed a Motion for Appointment of Conflict Counsel (R., pp. 129-33). His motion was supported by the affidavit of his father, Robert Cook (R., pp. 134-

43), and an unsworn statement allegedly penned by Nathan Ames, a friend interviewed by police on the night of the incident (R., pp. 144-45).

Cook's motion to appoint conflict counsel was granted on December 21, 2015, at which point the state's motion for summary dismissal and the court's notice of intent to dismiss were still pending. (R., pp. 153-54.) New counsel Michael Nelson was given until January 11, 2016 to file "any response" to the state's motion, or to file amended pleadings. (R., pp. 154-55.)

On January 11, Cook filed a Motion To Extend Time To File Additional Information. (R., pp. 156-57.) In it, counsel Nelson stated that "[a]fter speaking with the Petitioner, there are several affidavits that the Petitioner would like to submit to support his original petition and Counsel needs an additional week to submit the information to the court." (R., p. 156.) That extension was granted, giving Cook until January 18, 2016, to file additional information. (R., p. 158.) No additional information was filed. (See generally, R.)

The district court held a status conference on February 8, 2016 and took up the motion to extend time:

> MR. NELSON: So Cook is a case where the Court entered a notice of intent to dismiss.
>
> COURT: Right.
>
> MR. NELSON: I filed a motion to extend time. I did speak with Mr. Cook himself. He asked me to follow up with a few people. Unfortunately, this is a tough one because the information—
>
> COURT: Hold on …. We're back with Cook.
>
> MR. NELSON: All right. So I notice that the—the Court had filed a notice of intent to dismiss. Mr. Cook had—wanted me to file some

> additional affidavits. Upon research, it appears that they would be affidavits containing hearsay. I just spoke to his previous lawyer.
>
> I know that I then filed a motion for additional time. Upon my research, I didn't see any additional information but I know the Court filed for a status conference. I guess I'm not sure exactly what the Court's position was at this time, Your Honor.
>
> COURT: Well, I don't know that there's been any additional information filed.
>
> MR. NELSON: No. I haven't, Your Honor.

(R., pp. 160-61; 2/8/16 Tr., p. 4, L. 5 – p. 5, L. 5.) The state submitted on its briefing and relied on "the Court's notice of intent that the case would be dismissed at this time for failure to support the petition as alleged." (2/8/17 Tr., p. 5, Ls. 12-15.) The district court dismissed the petition. (R., pp. 162-73; 2/8/17 Tr., p. 5, Ls. 16-17.)

Five days after the dismissal, Cook filed a *pro se* Notice To The Court and Request for Time Extension on Motion to Reconsider. (R., pp. 174-179.) In it, he accused post-conviction counsel Nelson of lying to the court, only speaking to him one time, and never contacting witnesses. (See R., pp. 174-79.) The district court never ruled on this motion. (See generally, R.)

On March 17, 2016, Steve Carpenter filed notice that he was substituting in as counsel in place of Nelson. (R., pp. 191-92.)

Cook thereafter filed a Motion for Reconsideration, asking the district court to reconsider its dismissal of the petition. (R., pp. 194-97.) The Motion for Reconsideration set forth several bases for relief, including that Cook "obtained affidavits and prepared to proffer evidence through witness testimony to the court," but that counsel Nelson "failed to file affidavits or interview witnesses."

(R., p. 195.) Cook also alleged that he "instructed previous counsel [Nelson] to motion for reconsideration within the (14) fourteen-day timeframe outlined in IRCP 11(a)(2)(b)" but "[t]hat motion was never filed." (R., p. 195.) Cook stated that "[d]ue to these errors" and others, he "simply asks that this matter be calendared for an evidentiary hearing and the dismissal be overturned." (R., p. 196.) The state objected, arguing that whether the motion was construed under Idaho Rule of Civil Procedure 59 or 60, Cook had failed to set forth grounds for relief. (R., pp. 200-05.)

The district court heard argument on the Motion to Reconsider. (R., pp. 207-08.) At argument, Cook's counsel stated that:

> Mr. Cook has identified issues of fact that were apparent in the initial case regarding both the clothing that he was wearing, the items that he was arrested with, the description of his vehicle he was arrested on to the police, his whereabouts and location at the time of the arrest and he has not been allowed the opportunity to present this evidence to the Court.

(4/21/16 Tr., p. 4, L. 19 – p. 5, L. 1.) Cook's counsel argued that he was not "throwing aspersions" on the court, but on previous counsel, and "due to inaction of counsel and failure to collect and present evidence that Mr. Cook has not been given his fair shot in court." (4/21/16 Tr., p. 5, Ls. 2-6.) He specifically took issue with Nelson not "filing any information or any amended petition to overcome the Court's notice of intent or motion for summary dismissal," and never giving Cook "an opportunity to present by affidavit or testimony any of the evidence that would indicate that there's an issue of material fact in this case." (4/21/16 Tr., p. 5, Ls. 17-21.) Counsel also argued that "[w]e have filed affidavits by Robert Cook, [Louannie] Stambaugh and Nathan [Ames] in support of—as

well as an affidavit by Mr. Cook which should be in the court record that also testified to points of evidence."[1] (4/21/16 Tr., p. 8, Ls. 11-15.)

The district court began its ruling by finding that the Motion to Reconsider was "a motion to amend the pleadings under 59." (4/21/16 Tr., p. 8, Ls. 23-24.) The court went through the procedural history of the case and found that:

> On the 29th of January, the Court issued a notice of hearing to set the case for a status conference on February 8 and Mr. Nelson appeared and advised the Court there's no additional admissible evidence to be filed and the State had already filed its motion for summary dismissal. The Court had already filed its notice of intent to dismiss if nothing else was filed and therefore, the Court ordered a dismissal of the petition and detailed the findings on the February 22 order and it's that order that the defendant—or the plaintiff is now seeking to reconsider or amend.
>
> And I'm going to deny the motion to reconsider or amend. I find there's no errors of law or facts surrounding the Court's dismissal. So I'm going to deny the motion.

(4/21/16 Tr., p. 9, L. 22 – p. 10, L. 11.) The district court denied the Motion to Reconsider. (R., pp. 209-10.) Cook timely appealed, only from the order denying reconsideration. (R., pp. 211-14, 233-37.)

[1] Cook's affidavit is in the record at R., pp. 198-99, and Stambaugh's affidavit can be found at R., pp. 180. The Ames and Robert Cook affidavits were not in the original record on appeal, nor in the district court's register of actions, but have since been augmented to the appellate record at Aug. pp. 4-5, and pp. 8-17.

ISSUE

Cook states the issue on appeal as:

> Whether the district court analyzed Mr. Cook's Motion for Reconsideration under the wrong standard, and so, erroneously denied that motion.

(Appellant's brief, p. 10)

The state rephrases the issue as:

Has Cook failed to show that the district court improperly denied his motion for reconsideration, regardless of whether the motion should have been analyzed under Rule 59 or Rule 60?

ARGUMENT

Cook Has Failed To Show The District Court Erred In Denying His Motion For Reconsideration, Regardless Of Whether The Motion Should Have Been Analyzed Under Rule 59 Or 60

A. Introduction

Cook argues on appeal that the district court erred by analyzing his motion to reconsider under Idaho Rule of Civil Procedure 59 as opposed to Rule 60. He contends that because his motion presented new information to the court, and was filed beyond the 14-day time limit, a Rule 60 analysis was warranted. (Appellant's brief, pp. 11-15.) He argues that whether or not this Court considers the underlying merits of his Rule 60(b) claim, the denial of his motion should be vacated, and this case remanded. (Appellant's brief, pp. 15-22.)

These arguments fail. Cook's motion presented either information that was already known to the court, or that while "new" was insignificant. The district court therefore properly considered, and denied, Cook's motion per Rule 59. Further, even if the motion was analyzed under Rule 60, Cook has failed to show that he was entitled to relief as a matter of law. Regardless of which rule is applied the district court correctly denied his motion to reconsider.

B. Standard Of Review

Decisions to deny a post-judgment motion, whether brought under I.R.C.P. 59(e) or 60(b), are reviewed for an abuse of discretion. Straub v. Smith, 145 Idaho 65, 71, 175 P.3d 754, 760 (2007); Lowe v. Lym, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (1982); Schultz v. State, 155 Idaho 877, 883, 318 P.3d 646, 652 (Ct. App. 2013). "[W]hen the discretion exercised by a trial court is

affected by an error of law," this Court's role is ordinarily to "note the error and remand the case for additional findings." Eby v. State, 148 Idaho 731, 737, 228 P.3d 998, 1004 (2010). Remand is not required, however, if "there is an alternative ground for upholding the district court's decision." See id; Bias v. State, 159 Idaho 696, 706, 365 P.3d 1050, 1060 (Ct. App. 2015), review denied (Mar. 3, 2016).

C. The District Court Properly Analyzed Cook's Motion Under Rule 59(e)

When a litigant files an ambiguously titled post-judgment motion, such as Cook's "Motion to Reconsider" here, "courts consider the substance of the motion to determine whether it is properly a Rule 59(e) or a Rule 60 motion." See Bias, 159 Idaho at 706, 365 P.3d at 1060 (citing Vierstra v. Vierstra, 153 Idaho 873, 879, 292 P.3d 264, 270 (2012)). "A motion is most appropriately considered a motion to alter or amend a judgment pursuant to Rule 59(e) when it is filed within fourteen days of the entry of judgment and is premised solely upon information that was before the court at the time judgment was rendered." Bias, 159 Idaho at 706, 365 P.3d at 1060; Dunlap v. State, 141 Idaho 50, 58, 106 P.3d 376, 384 (2004); Schultz v. State, 155 Idaho 877, 883, 318 P.3d 646, 652 (Ct. App. 2013). Where a motion presents "new information or issues for the court to consider, treatment as a motion for relief from judgment under Rule 60(b) is most appropriate." Bias, 159 Idaho at 706, 365 P.3d at 1060; Ross v. State, 141 Idaho 670, 672, 115 P.3d 761, 763 (Ct. App. 2005). However, a motion that does not present new information will not automatically be treated as a Rule 60 motion, simply because it was not timely filed. See Ross, 141 Idaho at

671-72, 115 P.3d at 762-63 (noting that "insofar as [defendant's motion] could be treated as a Rule 59(e) motion" it was untimely and therefore subject to denial).

Here, the district court explicitly analyzed Cook's ambiguously titled Motion for Reconsideration under Rule 59. (4/21/16 Tr., p. 8, Ls. 23-24.) This was the correct analysis because, even though the motion was not filed in 14 days, there was no new information in it pertaining to the judgment. For example, Cook's motion goes through a laundry list of procedural history leading up to the dismissal. (See R., pp. 194-96, ¶¶ 1, 3-4, 7.) But the case's procedural history would have already been known to the court. Likewise, *post*-judgment procedural history, or other "new" information regarding alleged post-judgment events—such as decisions whether to file a motion to reconsider—by definition could not have pertained to the judgment, and are therefore irrelevant to the analysis. (See R., pp. 195-96.) Finally, Cook's motion states that he "obtained affidavits and prepared to proffer evidence through witness testimony to the court," and that counsel Nelson "failed to file affidavits or interview witnesses." (See R., p. 195, ¶¶ 5-6.) But Nelson himself informed the court of this prior to dismissal:

> MR. NELSON: All right. So I notice that the—the Court had filed a notice of intent to dismiss. Mr. Cook had—wanted me to file some additional affidavits. Upon research, it appears that they would be affidavits containing hearsay. I just spoke to his previous lawyer.
>
> I know that I then filed a motion for additional time. Upon my research, I didn't see any additional information but I know the Court filed for a status conference. I guess I'm not sure exactly what the Court's position was at this time, Your Honor.
>
> COURT: Well, I don't know that there's been any additional information filed.

MR. NELSON: No. I haven't, Your Honor.

(2/8/16 Tr., p. 4, L. 17 – p. 5, L. 5.) Thus, the allegations that Nelson did not file affidavits and did not meet with witnesses were not new information, as Nelson explicitly told the court that he "just spoke to [Cook's] previous lawyer," and that he did not file the affidavits that Cook wanted him to file. (2/8/16 Tr., p. 4, L. 17 – p. 5, L. 5.) Because Cook's motion to reconsider simply restated these matters, already in the record, it presented no new information, and the district court correctly analyzed Cook's motion under Rule 59(e).

As for the motion itself, it did not identify with particularity any Rule 59(e) grounds for reconsideration, nor did it identify any particular errors of fact or law in the district court's notice of intent to dismissal.[2] (See R., pp. 194-97.) Likewise, Cook's counsel stated that there were "issues of fact" that could have been identified by Nelson in an amended petition, but did not explain with any particularity how those facts would have affected the grounds for dismissal. (See generally, 4/21/16 Tr., p. 4, L. 19 – p. 5, L. 23.) The court therefore correctly denied the motion, finding there were "no errors of law or facts surrounding the Court's dismissal [of Cook's petition]." (4/21/16 Tr., p. 10, Ls. 8-11.)

Cook argues the district court erred by applying Rule 59 instead of Rule 60(b) because his motion met the two-part test of (1) not being filed within 14 days and (2) presenting new evidence. (Appellant's brief, pp. 12-15.) As set

[2] To the extent the motion argued that Cook "was not allowed to be present at the hearing" for summary dismissal, Cook did not cite to any legal authority that would show this was an error justifying Rule 59 relief. (See R., p. 195.) Cook has not renewed this claim on appeal and appears to have abandoned it. (See generally, Appellant's brief.)

forth above, his motion passes only the first prong of this test and fails on the second.

Cook argues he presented new evidence supporting a new claim that post-conviction counsel Nelson "had been completely absent in his representation," which necessitates a Rule 60(b) analysis. (Appellant's brief, p. 13.)

This argument fails for several reasons. First, Cook is arguing for the first time on appeal that Nelson was "completely absent in his representation." The motion itself did not allege complete absence—it alleged that Nelson did not contact Cook and his witnesses as much as Cook wanted, and did not file everything he was asked to file. (See generally, R., pp. 194-97.)[3] Thus, arguing that the motion presented a "new claim that Mr. Nelson had been completely absent" overstates the claim actually presented below.

Second, as explained above, Nelson's decision not to file the affidavits was not new information. Nelson himself made clear to the court that he did not file any affidavits because he knew the affidavits contained inadmissible hearsay. (2/8/16 Tr., p. 4, L. 17 – p. 5, L. 5.) The affidavits themselves only support this rationale, as they contain irrelevant statements or inadmissible

[3] While Cook's affidavit in support of his motion states that "I have been unable to contact my prior counsel, Michael Nelson, throughout these proceedings" (R., p. 198), this is belied not only by Nelson's statements to the district court (2/8/16 Tr., p. 4, Ls. 8-10), but by Cook's own affidavit incorporating a letter to the court (R., p. 177 (stating "[s]ince the appointment of [Mike] Nelson, he has spoken to me by phone once on the last week of January," (capitalization corrected)).) Taken together, neither the record nor Cook's motion show that Nelson was "completely absent."

hearsay, and do not contain any new information that would support a claim that Nelson was "completely absent." (See Aug., pp. 4-17.)

Cook argues that "even if Rule 59(e) were the controlling provision in this case, the district court still erred in its analysis of Mr. Cook's motion under that provision." (Appellant's brief, p. 13, n. 6.) Specifically, Cook takes issue with the district court's statement that "Petitioner has failed *to sufficiently support* his Motion for Reconsideration." (Appellant's brief, p. 13, n. 6 (citing R., p. 209, emphasis in Appellant's brief).) He argues that because a Rule 59(e) analysis is limited to the information in the record, the court's statement about insufficient support betrayed an analysis that went beyond the record. (See Appellant's brief, p.13, n. 6.) This is incorrect, because it is axiomatic that civil litigants must support the motions that they file. Rule 59 itself requires that the motion "must be accompanied by an affidavit stating in detail the facts relied upon in support of the motion." I.R.C.P. 59(a)(2). Here, Cook's motion failed to support, either as a legal or factual matter, any grounds that would have justified granting Rule 59(e) relief. The court thus correctly concluded that Cook's motion failed to show "errors of law or facts surrounding the Court's dismissal" (4/21/16 Tr., p. 10, Ls. 9-10), and its statement regarding "insufficient support" does not reveal any analytical error.

Cook has failed to show that there was new information in his motion that would have necessitated a Rule 60 analysis, and has failed to show that a Rule 59 motion would have prevailed on the merits. The district court therefore did

not abuse its discretion by analyzing, and denying, Cook's motion pursuant to Rule 59(e).

D. Alternatively, Even If The Court Was Required To Analyze Cook's Motion Under Rule 60, The Motion Was Correctly Dismissed Because Cook Has Failed To Show That He Was Entitled To Relief As A Matter Of Law

Even where a district court errs by analyzing an ambiguously titled motion under Rule 59, as opposed to Rule 60, this Court will not reverse unless the appellant can show he was "entitled to relief as a matter of law under Rule 60(b)." Bias, 159 Idaho at 706-07, 365 P.3d at 1060-61. Under Rule 60(b) a party may seek relief from a final judgment for such reasons as "mistake, inadvertence, surprise, or excusable neglect," or for "any other reason that justifies relief." I.R.C.P. 60(b)(1), (6); see also Bias, 159 Idaho at 706, 365 P.3d at 1060.

In Bias, the district court erroneously analyzed an ambiguously titled post-judgment motion under Rule 59(e) as opposed to Rule 60. Id. The Bias Court found that the motion "contained new information via allegations of ineffective assistance of post-conviction counsel," and therefore should have been analyzed under Rule 60, "[r]egardless of whether new information or issues presented" in such a motion "are sufficient to establish grounds for relief." Id.

But the Bias Court also found that while the district court erred by treating Bias's motion as a Rule 59(e) motion, where a trial court order "is based on an erroneous legal theory, but is supported by a correct alternative legal theory, we will nonetheless uphold the trial court's decision." Id. The Bias Court accordingly "turn[ed] to whether Bias was entitled to relief under Rule 60(b)." Id.

Bias argued "that the Idaho Supreme Court's holding in *Eby v. State*, 148 Idaho 731, 228 P.3d 998 (2010), establishes that ineffective assistance by post-conviction counsel constitutes a sufficient basis for granting relief under Rule 60(b)." Bias, 159 Idaho at 706, 365 P.3d at 1060. However, the Court rejected this argument, and its reasoning is directly applicable here:

> Bias's reliance on *Eby* is misplaced. In *Eby*, the petitioner's post-conviction counsel failed to file *any response* to the court's issuance of no less than five notices of its intention to dismiss his case for inactivity pursuant to I.R.C.P. 40(c). After the court dismissed the case under Rule 40(c), petitioner's fourth post-conviction attorney sought relief under Rule 60(b), which the court denied. On appeal, the Idaho Supreme Court reiterated that petitioners do not have a right to effective assistance of post-conviction counsel. However, because post-conviction proceedings constitute "the only available proceeding for [a petitioner] to advance constitutional challenges to his conviction and sentence," relief may be warranted under Rule 60(b) in the "unique and compelling circumstances" where a petitioner experiences *"the complete absence of meaningful representation."* (emphasis added).
>
> Here, Bias's motion does not allege a complete absence of post-conviction representation, nor does the record support such a finding. Bias's post-conviction counsel filed a responsive brief and supporting affidavits after the State filed a motion for summary dismissal. Unlike the petitioner in *Eby*, Bias did not experience a "complete absence of meaningful representation." Bias's dissatisfaction with his post-conviction counsel's performance does not constitute the "unique and compelling circumstances" required before a court may grant relief under Rule 60(b). Therefore, because Bias was not entitled to relief as a matter of law under Rule 60(b), we uphold the district court's denial of his post-judgment motion.

Id. at 706–07, 365 P.3d at 1060–61 (internal citations omitted, emphasis in original).

Bias and Eby resolve the issues here. Even if the district court erred by not analyzing Cook's motion under Rule 60, Cook was not entitled to relief

pursuant to Rule 60 as a matter of law. Cook has no statutory or constitutional right to effective assistance of post-conviction counsel. Murphy v. State, 156 Idaho 389, 395, 327 P.3d 365, 371 (2014) ("Where there is no right to counsel, there can be no deprivation of effective assistance of counsel."). Eby provides a narrow ability to bring a Rule 60(b)(6) claim for ineffective assistance of post-conviction counsel, but it is well settled that this exception only applies where a petitioner experiences a *complete absence* of meaningful representation. See Eby, 148 Idaho at 737, 228 P.3d at 1004; see also Bias, 159 Idaho at 706–07, 365 P.3d at 1060–61. Here, the record establishes without doubt that Nelson was not completely absent from the case. To the contrary, Nelson discussed the case with Cook (2/8/16 Tr., p. 4, Ls. 8-9; R., pp. 156, 177), spoke with prior counsel about the case (2/8/16 Tr., p. 4, Ls. 21-22), filed a pleading requesting an extension of time (R., pp. 156-57), performed research (2/8/16, p. 4, Ls. 24-25), and appeared at a status conference (2/8/16 Tr.). While Cook may wish in hindsight that Nelson did things differently, Nelson explained on the record why he did not file additional information. (2/8/16 Tr., p. 4, L. 8 – p. 5, L. 1.) And while Cook may have been dissatisfied with his counsel, dissatisfaction alone is not a "unique and compelling" circumstance justifying relief. Because Cook has shown nothing near a "complete absence of meaningful representation," he cannot find Rule 60(b)(6) relief on this claim.

Cook also argues, for the first time on appeal, that Nelson's "failure to file a motion for reconsideration of the order summarily dismissing the petition at Mr. Cook's request" presents separate grounds for relief based specifically on Rule

60(b)(1). (Appellant's brief, pp. 19-22.) He contends that Nelson's actions led to excusable neglect, akin to a failure to "reasonably act to prevent improper default judgment." (See Appellant's brief, p. 20.) Cook argues that because he "timely instructed, and thus, reasonably relied on, his attorney, Mr. Nelson, to file a motion for reconsideration of the order summarily dismissing his petition," that he would have been entitled to relief under Rule 60(b)(1). (Appellant's brief, p. 20.)

This argument fails for several reasons. First, Cook never argued below that Nelson's failure to file a motion for reconsideration was excusable neglect; the district court accordingly had no opportunity to rule on the question. (See R., pp. 194-97; 4/21/16 Tr., pp. 4-8); State v. DuValt, 131 Idaho 550, 553, 961 P.2d 641, 644 (1998). Nor does Cook allege now that as a matter of law counsel is always obligated to file, upon demand, every pleading that a civil litigant asks them to file. (See generally, Appellant's brief.)

Cook has also failed to show that refusal to file a reconsideration motion here would have been neglect, as opposed to a reasonable strategic decision. Cook argues that Nelson committed neglect by not filing a motion to reconsider because Nelson could have premised such a motion on existing information in the record—namely, statements from Nathan Ames and Robert Cook. (See Appellant's brief, p. 20-22.) This argument fails for several reasons. The statement from Nathan Ames was not sworn, and does not refute the evidence that "he, Mr. Ames, had told officers Mr. Cook had not been riding the motorcycle the police had been pursuing." (See Appellant's brief, p. 21 (citing R., p. 144).) Rather, Ames's statement contains the double-hearsay assertion that "[trial

counsel] also told Jeremy & his family that I told the police that Jeremy was in fact driving," which Ames only contends the *discovery* does not say. (R., p. 144.)[4] Likewise, oblique statements from Robert Cook that "there existed numerous witness that would have testified that Jeremy has never been to the 'Rodeo Bar', where this alleged crime had supposedly taken place," would likewise have been inadmissible hearsay. (R., p. 140.)

Even if these statements were admissible, it is farfetched that they would have affected the notice of dismissal. Cook's petition was dismissed because, among other things, his guilty plea waived "all non-jurisdictional defects and defenses, whether constitutional or statutory, in prior proceedings"—including the "failure of counsel to present a defense." (R., pp. 123-24.) The guilty-plea waiver would therefore include failures to present the defenses Cook argues the statements support (including an alibi defense, a mistaken-motorcycle defense, and a defense that Cook had not been to the Rodeo Bar on the night in question). (See Appellant's brief, p. 21.) Given the dismal odds that the statements of Ames and Robert Cook could have affected the dismissal, even assuming they were admissible, Cook fails to show that Nelson's refusal to file a motion based on them was due to neglect, as opposed to a reasonable, tactical decision.

[4] It is worth noting that the discovery appears to say exactly that: the police report states that "Ames said the Suzuki belonged to Cook," and that "Ames said the motorcycle belonged to Cook. Cook drove it to the Sportsman's bar this evening." (PSI, pp. 41-42.)

Finally, Cook has failed to show that the dismissal of this petition was the result of the alleged excusable neglect. See Sines v. Blaser, 98 Idaho 435, 566 P.2d 758 (1977). In Sines, the court clerk failed to notify the parties of an entry of judgment. Id. at 436, 566 P.2d at 759 (drolly noting that the judgment notice "took its place in the court files where it obviously served no purpose whatever"). The parties were therefore unaware that judgment was entered, and as a result of the blunder, the appellant missed the deadlines for filing post-judgment motions. Id. Critically, it was the untimeliness of the filing—and not the merits of the claims—that doomed the motions:

> On December 10, 1974, counsel for appellants, unaware that judgment had been entered, filed a motion to set aside or amend the findings, a motion for judgment n.o.v., and, in the alternative, a motion for a new trial. At a hearing on December 20, 1974, the trial court, by order entered the same date, **denied all three motions, not on their merits, but as not having been timely filed.**

Id. (emphasis added). The Court understandably found that failure to timely file motions, due only to a lack of notice, constituted excusable neglect. See id. at 438-40, 566 P.2d at 761-63. The Sines Court therefore reversed the denial of the Rule 60 motion. Id. at 440, 566 P.2d at 763.

By contrast, there was no blown filing deadline here, no default judgment, nor any other perceptible disadvantage stemming from Nelson's alleged neglect by not filing the motion. After Nelson left the case, Cook's new post-conviction counsel filed a reconsideration motion, and Cook accordingly never lost the opportunity to challenge the dismissal through a motion to reconsider. The motion for reconsideration was ultimately considered and denied on the merits. (4/21/16 Tr., p. 10, Ls. 8-10 ("And I'm going to deny the motion to reconsider or

amend. I find there's no errors of law or facts surrounding the court's dismissal.").) Consequently, Cook has failed to show complete absence of meaningful assistance or excusable neglect, and has therefore failed to show that he is entitled to Rule 60 relief on the merits. Even if his motion should have been analyzed as a Rule 60 motion it was correctly denied by the district court.

CONCLUSION

The state respectfully requests this Court affirm the denial of Cook's Motion to Reconsider.

DATED this 20th day of March, 2017.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of March, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd